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April 8, 2005

VIA HAND DELIVERY

Michael E. Toner, Vice Chairman  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

Re: MUR 5645  
Highmark, Inc.  
David O'Brien

Dear Mr. Toner:

This letter is in response to your February 25, 2005 Notification with Factual and Legal Analysis (the "Commission's Analysis") that indicated the Federal Election Commission ("Commission") had found reason to believe Highmark, Inc. ("Highmark") violated 2 U.S.C. §§441b(a) and 441c(a)(1) and David O'Brien ("O'Brien"), Executive Vice President of Highmark, violated 2 U.S.C. §441b(a).

**I. Introduction**

This matter came to the attention of the Commission as a result of an internal compliance program investigation and voluntary disclosure by Highmark. In its Report of Investigation and Voluntary Disclosure by Highmark, Inc. of Certain Payments and Items of Value Provided to Federal Campaign and Political Action Committees, dated June 14, 2004 (the "Disclosure Report"), Highmark acknowledged that it had engaged in activities that constitute prohibited federal campaign contributions. However, none of these violations were knowing or willful. The violations were the sole responsibility of former Vice President, Government Affairs, Bruce Hironimus ("Hironimus") and in violation of company policy.

David O'Brien's only alleged violation was his action in approving a single expense reimbursement to Hironimus of \$370.41 for wine donated to a fundraiser for U.S. Senator Rick Santorum. O'Brien's approval was based on a misrepresentation or misstatement by Hironimus which led O'Brien to believe that the event was a Highmark PAC activity and, thus, that the donation of wine was lawful. As discussed further below, we submit that the Commission's

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finding against O'Brien should be dismissed. Additionally, both Highmark and O'Brien deny any additional violations of section 441b(a) in the form of corporate facilitation.

## II. Payments to Defray the Costs of Senator Santorum Events

As documented in the Disclosure Report and the Commission's Analysis, Highmark did unknowingly use \$52,303.59 in corporate funds to defray some of the costs of various Senator Santorum fundraising events between 1998 and 2003. Specifically, Hironimus either submitted a check request for prepayment of an expense, or he sought reimbursement for expenses that included greens fees, golf cart fees, meals, beverages, prizes and handouts in connection with golf event fundraisers and for catering and wine in connection with a fundraiser in a private home. These payments are detailed in the Commission's Analysis and will not be repeated here. In the course of responding to the Commission's request for additional documents, we have discovered two other potential violations in addition to the above payments which are discussed below.

Also as noted in the Commission's Analysis, Hironimus had the authority to approve the check requests himself. Accordingly, no other corporate officer had any knowledge of or role in those expenditures, which total \$35,267.93. With one exception which is discussed below, all of the expense reports submitted by Hironimus were approved by George Grode ("Grode"), former Executive Vice President for Government Business and Corporate Affairs at Highmark. The expense reports approved by Grode total \$16,665.25. The one exception was a single expense report approved by O'Brien for \$370.41 in wine for a Santorum fundraiser held at the home of Stan and Gretchen Rapp in 2003. No Highmark corporate officers aside from Hironimus, Grode and O'Brien are alleged to be involved with any violations of campaign finance laws.

Of these three officers, O'Brien is the only officer currently employed by Highmark. Hironimus was fired when his alleged illegal campaign finance activities were discovered. Grode retired from Highmark in 2003 for reasons unrelated to this matter. The expense reports approved by Grode are addressed in a separate response to your February 25, 2005 Notification with Factual and Legal Analysis sent to Grode.

Hironimus was Highmark's chief lobbyist. He had been with the company since 1987 and was experienced and highly respected, both inside the company and outside. Hironimus continually portrayed himself as knowledgeable about federal campaign finance issues. We learned during the course of our investigation, however, that Hironimus had not read, attended training on, or asked for advice from Highmark lawyers about the relevant federal statutes. Instead, he relied on information he picked up from his contacts in the lobbying community. (See Memorandum of Interview of Bruce Hironimus, Exhibit 18, Disclosure Report at 1-2.) Because of his reputation, experience and perceived expertise, Grode, O'Brien and others in the

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company relied on Hironimus to insure that the company was in compliance with all federal campaign finance laws and regulations. As the Commission has noted, Hironimus alone was responsible for the vast majority of the improper contributions that are the subject of this inquiry. Grode and O'Brien relied on him, to their detriment, for the entire remainder.

When O'Brien first saw Hironimus's June 30, 2003 expense report for \$449.79, he had only been in his position for six months. O'Brien had no prior involvement in or experience with campaign finance issues. Therefore, he relied heavily on Hironimus for appropriate guidance. Nevertheless, O'Brien questioned Hironimus about the expense. As discussed in the Disclosure Report at page 19, Hironimus explained that some of the wine had been used for a Highmark dinner meeting and the rest had been used for a Santorum fundraising event sponsored by the Highmark PAC ("Health PAC").<sup>1</sup> Because of O'Brien's lack of knowledge of campaign finance law, and because Hironimus had indicated the wine was used for a Highmark PAC event, O'Brien approved the expense. (Id., See also Exhibit 22 to the Disclosure Report, Memorandum of Interview of David O'Brien.) In reality, the Rapp fundraiser was not a Highmark PAC event. Because of this, the \$370.41 in wine donated to the fundraiser was an illegal in-kind corporate contribution. Thus, O'Brien's involvement in this violation was innocent and unknowing. While Highmark has accepted responsibility for the actions of Hironimus, we submit that the findings against O'Brien should be dismissed.

In addition to the check requests and expense reimbursements contained in the Disclosure Report and the Commission's Analysis, and in response to the Commission's request for additional documents and information, we have contacted Matthew Steck, a partner with Greenlee Partners LLC ("Greenlee"). Greenlee is a lobbying firm with which Highmark has a relationship. At our request, Steck carried out a review of Greenlee's files and those of its subsidiary, Keystone Strategies ("Keystone"). Keystone is a separate entity which "provides fundraising services to campaign finance and other similar fundraising committees." (Memorandum of Interview of Matthew J. Steck, attached as Exhibit 1 to this response, at ¶ 2.) He discovered two Keystone invoices that appear to relate to services provided to Santorum fundraising events. The first invoice dated July 12, 1999 in the amount of \$1,388.08 was for printing, office supplies, postage, copying and printing, and picture frames that appear to be related to the Santorum 2000 golf outing on May 17, 1999. (See Exhibit 2 attached hereto).<sup>2</sup> The invoice was paid by Highmark based on a check request authorized by Hironimus on July

<sup>1</sup> It should be noted that the only evidence related to the use of the wine for the Santorum fundraiser has been provided by Bruce Hironimus. There has not been any independent corroboration. Numerous other statements made by Hironimus in the course of this investigation did not stand up to further scrutiny. David O'Brien did not attend the fundraiser at the Rapp home, so he does not have personal knowledge of the use of the wine.

<sup>2</sup> Note that this invoice was generated by Keystone Strategies' financial records system which reflects an updated addressee of "Santorum 2006" in the "Bill To" field. As reflected in Highmark's copy of the invoice issued at the time (See Exhibit 3), the "Bill To" field reflects that the original invoice was directed to the "Santorum 2000" Committee.

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14, 1999. (See Exhibit 3 attached hereto). The second invoice dated June 19, 2002, in the amount of \$386.80 was for printing and office supply services related to the May 2002 America's Foundation golf fundraiser (attached as Exhibit 4). This invoice was submitted to Hironimus at Highmark (Id. ), and further investigation has revealed that it was paid with Highmark corporate funds based on a check request submitted by Hironimus.<sup>3</sup> No other Highmark officer approved or was aware of either of these expenditures, as they came within the signature authority of Hironimus. (See Exhibit 5 attached hereto.)

### III. Corporate Resources to Raise Money for Senator Santorum Events

We have found no evidence that any Highmark employee, including Hironimus, Grode or O'Brien, spent corporate time or expended corporate resources beyond the limited exemptions provided for in 11 C.F.R. § 114.9. It is clear that neither Grode nor O'Brien spent more than isolated, incidental time related to any of the Santorum fundraising activities. Besides Grode's attendance at one or more of the actual golf outings, he did not do anything more than recruit non-Highmark employees to fill out his foursome. (See Exhibit 20 to the Disclosure Report at ¶ 24.) Hironimus's activities in organizing and conducting the fundraisers were independent of Highmark and its employees. This is demonstrated in the Tournament Confirmation Agreement ("Agreement") which he executed with the Country Club of Hershey for the May 17, 2002 golf outing. The Agreement is addressed to Hironimus, as an individual, at his home address. In addition, the Agreement refers to the event as the "Hironimus Golf Outing." (See Exhibit 6 attached hereto.) It should be further noted that corporate funds were not used to pay for Grode or Hironimus to attend the fundraisers. O'Brien did not attend any of the Santorum events and did not engage in any fundraising activities related to this inquiry. His only connection to this matter is his approval of Hironimus's reimbursement request discussed above.

The Commission has raised questions concerning the role of Megan Martin, "an employee at Greenlee Partners LLC" in the 2002 golf fundraiser and the 2003 Rapp fundraiser. (Commission's Analysis at 13). In response to these questions, we interviewed Matthew Steck of Greenlee. Steck advised us that Ms. Martin was a Greenlee employee who also provided event fundraising services to Greenlee's subsidiary, Keystone. She also knew Santorum personally and voluntarily attended and assisted at Santorum fundraisers. In response to an inquiry from Steck, Martin reported that any Greenlee/Keystone expenses related to the Santorum fundraisers would have been billed to Santorum's committee. (See Exhibit 1 hereto at ¶¶ 12-14). With the exception of the Keystone invoices for printing and office supplies discussed above, Steck and his staff were not able to identify any fundraising activities performed by Greenlee or Keystone employees which were paid for by Highmark. Steck further reported that Greenlee's consulting services for Highmark do not include PAC or fundraising activities. (Id. at ¶¶ 1, 6, 12-14).

<sup>3</sup> Note that the original invoice issued at the time was for the amount of \$403 67, but Highmark subtracted from that amount \$16 87 for Pennsylvania taxes because Highmark is a non-profit organization exempt from such taxes. Apparently, Keystone corrected the amount of the invoice in its system

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We do not represent Hironimus and have not contacted him in connection with this response. Nevertheless, based on our interviews with him prior to his termination and on the documents he has provided, it appears that Hironimus's activities related to the Santorum fundraisers were undertaken in his personal capacity and not as part of his employment at Highmark. In the literature connected with the golf events, he was identified only as Bruce Hironimus, and there was no identification of Highmark as a corporate sponsor. Contributions were not funneled through Highmark, and Highmark did not act as a conduit for third party contributions. Therefore, the suggestion that Highmark "resources were used in connection with collecting and forwarding contributions and/or organizing fundraising events" should be dismissed.

#### **IV. Federal Contractor Contributions**

For the same reasons discussed above, Highmark did unknowingly engage in activities that constitute prohibited corporate and federal contractor contributions in violation of 2 U.S.C. § 441c(a)(1). It should be clear, however, that none of the funds that are the subject of this matter were submitted to or reimbursed by the U.S. government. All costs and expenses related to Highmark's government affairs activities are processed through its Private Business accounting category, and are not included in any government contracting claims to the government.

#### **V.**

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## VI. Conclusion

As noted by the Commission, "a corporation can only act through its directors, officers and agents," and a corporation "can be held liable . . . for the acts of an employee within the scope of the employment and that benefit the corporate employer." Commission Analysis at 11. Highmark recognizes that it might be appropriate to hold it responsible for the actions of Hironimus described in the Disclosure Report and the Commission's Analysis and is prepared to address these issues with the Commission through the conciliation process. It is important to note, however, that many of Hironimus's actions in this case were undertaken with a specific intent to conceal their true nature from the company and in violation of a corporate policy which had been in place since at least January 1998. (See Disclosure Report Exhibit 5). All of the check requests, totaling \$35,267.93, were submitted by and paid to Hironimus without the knowledge of any other Highmark officer. The expense reimbursements, totaling approximately \$17,000, were approved by either Grode or O'Brien, but under the mistaken belief that they were proper.

In response to its initial discovery of potential violations of campaign finance laws, Highmark, as a corporation, has taken several important steps that clearly demonstrate its commitment to compliance with laws and regulations and to invest considerable company resources in accomplishing that goal. As soon as Highmark discovered potential wrongdoing on

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behalf of Hironimus, it conducted an internal review and analysis. When it was not satisfied with Hironimus's response to the internal inquiry, Highmark retained Holland & Knight to investigate the activity and provide a detailed legal and factual analysis. The results of the investigation were then immediately reported, *sua sponte*, to the Commission. In addition, in response to these discoveries, Highmark fired Hironimus, provided campaign finance law training to its government affairs staff, and tightened internal controls over expenditures.

O'Brien, the only current Highmark officer implicated in this matter, approved only one of the expense reports in question. He did so based upon the representation of Hironimus, a trusted employee, who was presumed to be knowledgeable in campaign finance law. O'Brien himself had almost no knowledge of campaign finance law and was new to his job. Accordingly, O'Brien's "violation" of the law was not knowing or willful. Instead, it was innocent and inadvertent.

For these reasons, we ask the Commission not to apply a standard of strict liability to Highmark and O'Brien. Highmark is willing to accept responsibility for the actions of one wayward employee (Hironimus). The violation by O'Brien, however, was *de minimis* and does not merit further Commission action. Under separate cover, we are requesting conciliation prior to a finding of probable cause pursuant to the rules of the Commission.

Respectfully submitted,

HOLLAND & KNIGHT LLP



Christopher A. Myers  
Douglas J. Patton